Supreme Court, U.S.
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No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1999

DR. LANING DAVIDSON,

Petitioner,

v.

DETROIT FREE PRESS, INC., a Michigan corporation; JANET WILSON; LJUBISA DRAGOVIC, And MARK WITECK,

Respondents.

PETTION FOR WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

And APPENDIX

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QUESTION PRESENTED FOR REVIEW

TO WHAT EXTENT DOES THE FIRST AMENDMENT'S *NEW YORK TIMES v. SULLIVAN* STANDARD, ALLOW MEDIA AND NONMEDIA ALEGED DEFAMERS TO DISTORT AND EXAGERATE THE TRUTH IN STATEMENTS MADE CONCERNING A PUBLIC OFFICIAL BUT, NEVERTHELESS, STILL REQUIRE A FINDING, AS A MATTER OF LAW, OF NO ACTUAL MALICE?

LIST OF PARTIES

The Petitioner in this case is Laning R. Davidson, who was the Plaintiff/Appellant in the proceedings below. The respondents are the Detroit Free Press, Inc., a Michigan corporation, Janet Wilson, Ljubisa Dragovic, and Mark Witeck who were the Defendants/Appellees.

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The Order denying the Application for leave to Appeal by the Michigan Supreme Court, which denied an appeal a further Appeal to the Michigan Court of Appeals is reprinted in the Appendix. It is from that Order that this Petition rises. The Opinion of the Michigan Court of Appeals and the Opinion and Order of the Wayne County Circuit Court are also contained in the Appendix. The Order of the Michigan Supreme Court and the Opinions below were not published.

STATEMENT OF THE BASIS OFJURISDICTION OF THE SUPREME COURT

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 (a) based on an appeal by right of a final Order of the Michigan Supreme Court that was entered on May 25,1999. Jurisdiction of this Court is based on the existence of a substantial federal question, namely, the First Amendment of the Constitution of the United States. The Michigan Court of Appeals relied on rulings of this Court in upholding the summary dismissal of this action. The Michigan Court of Appeals cited Garvelink v The Detroit News, 206 Mich App 604, 522NW2d 883,885-886 (1994), for the proposition that no actual malice could be found in this case and that that determination was a question of law. Garvelink, relied almost exclusively on decisions of this Court, provided as follows with regard to the question of actual malice:

> Our review is also governed by the Supreme Court's pronouncements in defamation cases implicating the First Amendment. Court's must make an independent examination of the record to assure that the judgment does not constitute a forbidden intrusion on the field of free expression. *NewYork Times Co. v. Sullivan,* 376 U.S. 254, 285, 84 S.Ct. 710, 728-29, 11 L.Ed.2d 686 (1964); *Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485, 499, 104 S.Ct. 1949, 1958-59, 80 L.Ed.2d 502 (1984); *Locricchio v. Evening News Assn,* 438 Mich. 84, 110, 476 N.W.2d 112 (1991). Where a public official or public figure is involved in a defamation case, the public official or public figure must prove that the publication was a defamatory falsehood and that the statement was made with actual

malice, that is, that it was made with knowledge that it was false or with reckless disregard of whether it was false or not. *Sullivan, supra,* 376 U.S. at 279-280, 84 S.Ct. at 725-26; *Curtis Publishing Co. v. Butts,* 388 U.S. 180, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967). In the instant case, it is undisputed that plaintiff is a public official.

For both public officials and public figures, a showing of actual malice is subject to a clear and convincing standard of proof. *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 342, 94 S.Ct. 2997, 3008, 41 L.Ed.2d 789 (1974). The question whether the evidence in a defamation case is sufficient to support a finding of actual malice is a question of law. *Harte-Hanks Communications, Inc. v. Connaughton,* 491 U.S. 657, 685, 109 S.Ct. 2678, 2694-95, 105 L.Ed.2d 562 (1989).

Keeping these principles in mind, the Supreme Court has further recognized constitutional limits on the type of speech that may be the subject of defamation actions. In cases where the statements cannot reasonably be interpreted as stating actual facts about the individual, those statements are protected under the First Amendment. *Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 20 ' 110 S.Ct. 2695, 2706-07, Ill L.Ed.2d 1 (1990); *Hustler Magazine v. Falwell,* 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988); *Letter Carriers v. Austin,* 418 U.S. 264, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974); *Greenbelt Cooperative Publishing Assn v. Bresler,* 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970).

CONSTITUTIONAL PROVISION

FIRST AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging their freedom of speech, or of the press; or the rights of the people peaceably to assemble, and to petition the government for a redress of grievances."

STATEMENT OF THE CASE

This is a defamation case. The Plaintiff/Appellant is Laning Davidson, an Assistant Wayne County Medical Examiner. The Defendants/Appellees are: the Detroit Free Press, Inc., a newspaper, Janet Wilson, a former Free Press Reporter, Ljubisa Dragovic, a former Wayne County Medical Examiner, and, Mark Witeck, a former Wayne County Medical Examiner. Both Dragovic and Witeck were fellow employees of the Petitioner. The Michigan courts ruled that the Petitioner failed to prove actual malice under the ***New York Times v. Sullivan,*** **infra**, standard and that statements were substantially true under this heightened standard.

In the December 22, 1993 edition of the Detroit Free Press, two (2) articles authored by Janet Wilson appeared The Plaintiff, in this lawsuit, has contended that these articles by the Detroit Free Press Defendants (The Detroit Free Press, Inc. and Janet Wilson) and by Ljubisa Dragovic and Mark Witeck, who were quoted in the articles, defamed him. Specifically, the Plaintiff's Complaint alleged that the following portions of the articles were defamatory:

> *"14. The articles were defamatory by way of partial explanation, as follows:*
>
> *a. that Dr. Laning Davidson keeps a personal camera at autopsy dissections;*
>
> *b. that Dr. Laning Davidson was terminated as a resident in nuclear medicine at the Naval Hospital in Bethesda, Maryland;*
>
> *c. that Dr. Laning Davidson requested a Florida medical license by automatic endorsement rather than through examination;*
>
> *d. that Dr. Laning Davidson was required to undergo a mental examination in Topeka, Kansas in 1986 to keep his Kansas medical license;*
>
> *e. that Dr. Laning Davidson was sloppy and inaccurate with regard to handling body organs. As alleged, the Detroit Free Press stated as follows:*

Witeck, now chief medical examiner in Kenosha County, Wis., said Davidson mixed up parts from different bodies and sometimes placed multiple organs in one corpse and left them out of another.

When his mistakes were called to his attention, "his response was, 'So?' recalled Witeck.

On May 3, 1989, Assistant Medical Examiner Ljubisa Dragovic wrote a memo to Cassin saying a body autopsied by Davidson had been released for burial on April 28, 1989, without a brain. Dragovic, now the Oakland County medical examiner and a vocal critic of Cassin, said that a week later the brain was "still unlabeled, unidentified, in a plastic bag filled with formalin" on a table in the autopsy room.

(in context of article);

f. that Dr. Laning Davidson incorrectly formed an absurd diagnosis and conclusion regarding ballistics testimony. The Detroit Free Press headline stated, "Doctor found a shot that was never fired";

g. that the Medical Licensing Board of Indiana placed him on probation, but later restored Davidson's full license.

18. That of the aforesaid defamatory communications the following are directly attributable to the Defendant Ljubisa Dragovic: that the Plaintiff had allowed a body, following an autopsy to be released without a brain. It is also contended that Defendant Ljubisa Dragovic instigated the above communications.

19. That of the aforesaid defamatory communications the following are directly attributable to the Defendant Mark Witeck: that the Plaintiff mixed up body parts and placed multiple organs in one corpse."

(Plaintiff's First Amended Complaint, Paragraphs 14, 18 and 19)

The Plaintiff/Appellant, Dr. Laning Davidson, has been an Assistant Medical Examiner in Wayne County since December of 1988. (Dep. Davidson, p. 5) Dr. Davidson is currently licensed in Michigan and Indiana

and has been licensed in Pennsylvania, Virginia, Maryland, Illinois, Kansas and the District of Columbia. (Dep. Davidson, p. 8)

Dr. Davidson graduated from Wayne State University and interned, while serving in the Navy, at Bethesda Naval Hospital. Dr. Davidson performed two (2) residency programs: One in nuclear medicine and one in anatomical and clinical pathology. (Dep. Davidson, p. 11) Prior and subsequent to the December 22, 1993 article, Dr. Laning Davidson has not been subjected to defamatory press. The Defendants Dragovic and Witeck had left the employment of the Wayne County Medical Examiner's Office prior to the publication of the allegedly defamatory article. The Plaintiff, Dr. Laning Davidson, has alleged and testified as to both economic and non-economic damages as a result of the defamation. (Dep. Davidson, p. 126)

Following the close of discovery, the Defendants filed Motions for Summary Disposition. The Lower Court granted the Motions in an Opinion and Order dated July 29, 1996. An appeal timely followed from that Opinion and Order to the Michigan Court of Appeals, which affirmed the dismissal of Petitioner's action in an unpublished Per Curiam Opinion issued August 14, 1998. A timely Application for Leave to Appeal was filed to the Michigan Supreme Court. Leave to appeal to the Michigan Supreme Court is discretionary The Application was denied on May 25, 1999. This Petition follows.

REASONS FOR GARANTING THE WRIT

Certiorari should be granted to review the decision of the Michigan Court of Appeals because this decision, which was not challenged by the Michigan Supreme Court, has bestowed complete First Amendment immunity to serious allegations amounting even to criminal misconduct made against a public employee without a factual basis. This ruling allows unbridled latitude to gross exaggeration and distortion under cover of the First Amendment.

Under the Michigan Court of Appeals decision, a claim that the Petitioner, an Assistant Medical Examiner, may have temporarily placed body parts in the wrong container next to an autopsy table was distorted and exaggerated to become a published report that he had placed body parts in the wrong body and left body parts out of others. A claim that the Petitioner mistook a shotgun pellet for a small caliber bullet was distorted and exaggerated to become a published report that the Petitioner found a shot that was never fired. Despite the fact that the non- media Defendants worked in the same Wayne County Medical Examiner's Office and were familiar with the fact that the Petitioner had no jurisdiction to prepare or release bodies, it

was claimed that the **Petitioner** released a body without a brain. Other distortions and exaggerations all specifically designed to cast the Petitioner in a sinister light were also made against the Petitioner. The essential question presented herein is whether this Court will provide First Amendment protection to false sensationalism under the cloak of free expression, New York Times v. Sullivan and a perversion of the substantial truth doctrine.

ARGUMENT

THE FIRST AMENDMENT DOES NOT REQUIRE THAT DISTORTED AND EXAGERATED STATEMENTS WHICH TOTALLY MISREPRESENT THE TRUTH ARE, NEVERTHELESS, STILL PROTECTED, AS A MATTER OF LAW, PURSUANT TO THE NEW YORK TIMES v. SULLIVAN STANDARD AND THE SUBSTANTIAL TRUTH DOCTRINE, ALTHOUGH THERE IS NO FACTUAL BASIS FOR THESE STATEMENTS.

A) The Defamation.

The most shocking and egregious allegation made against the Petitioner, Dr. Laning Davidson, concerned the Petitioner's supposed callous mishandling of body parts. These following defamatory allegations were contained within the December 22, 1993 Detroit Free Press article:

> *Mark Witeck, doing a residency at the time in the morgue, said Davidson was hard to work with.*
>
> *Witeck, now chief medical examiner in Kenosha County, Wis., said Davidson mixed up parts from different bodies and sometimes placed multiple organs in one corpse and left them out of another.*
>
> *When his mistakes were called to his attention, "his response was, 'So?' recalled Witeck.*

On May 3, 1989, Assistant Medical Examiner Ljubisa Dragovic wrote a memo to Cassin saying a body autopsied by Davidson had been released for burial on April 28, 1989, without a brain. Dragovic, now the Oakland County medical examiner and a vocal critic of Cassin, said that a week later the brain was "still unlabeled, unidentified, in a plastic bag filled with formalin" on a table in the autopsy room.

B) <u>Dragovic and Witeck Generated this Defamation</u>

Both Dragovic and Witeck are responsible for this defamation. Dr. Dragovic admitted showing Janet Wilson, the reporter for the Detroit Free Press, copies of memos that he had generated. He gave a Wayne County Morgue folder for Janet Wilson to review. (Dep. Dragovic, pp. 16, 17, 23) The Detroit Free Press Reporter, Janet Wilson, testified that Dragovic might have mentioned the mixing up of body parts before Witeck. (Dep. Wilson, p. 42) **According to Wilson, Witeck told her and Dragovic that Dr. Davidson, personally and physically mixed up parts from different bodies and sometimes placed the multiple organs in one corpse and left them out of another.** (Dep. Wilson, p. 42) It was Wilson's understanding that this happened more than once. (Dep. Wilson, p. 41) Wilson obtained this information from both Dragovic and Witeck. (Dep. Wilson, p. 41) **According to Wilson, the words attributed to Witeck were a verbatim quotation from him.** (Dep. Wilson, p. 40) Wilson testified that she had no doubt in her mind that it was a verbatim quote from Defendant, Mark Witeck. (Dep. Wilson, p. 40) Wilson testified that, contrary to the sworn testimony of all three of the medical examiners involved in this case (Davidson, Dragovic and Witeck) that her understanding of the Morgue procedure was for the Medical Examiner, who performed the autopsy, to return the body parts. (Dep. Wilson, p. 53) The Detroit Free Press reporters informed Dr. Davidson that they obtained documents through Dr. Dragovic. (Dep. Davidson, pp. 104-105) The Free Press reporters also informed Dr. Davidson that the Defendant, Dragovic, was the source of the allegation that Dr. Davidson was using a camera during autopsies for personal purposes. (Dep. Davidson, p. 225) Of course, Dr. Davidson has totally and unequivocally denied any mishandling of body parts or similar wrongdoing. (Dep. Davidson, pp. 175, 176, 185, 189)

C) Dr. Davidson Completely Denies this Wrongdoing

Janet Wilson, the Free Press Reporter, indicated that Dr. Davidson denied all charges to her. (Dep. Wilson, pp. 61-62) Dr. Davidson characterized Dr. Dragovic's statements as being completely false. (Dep. Davidson, p. 185) Dr. Davidson explained that the allegation pertaining to the May 3, 1989 Dragovic memo from Dr. Dragovic was as to a brain not left out by him but by a resident, Dr. Sabet. (Dep. Davidson, pp. 96-97, 212-213) It was not unusual for brains to sit on a shelf following an autopsy for further study. (Dep. Davidson, p. 213) In short, Dr. Davidson has sworn that the allegations were a complete fabrication. (Dep. Davidson, p. 217) **Dr. Davidson has denied that there was even a temporary mix up of body parts in a bucket during simultaneous autopsies and has denied that Witeck ever pointed out any such mix up to him.** (Dep. Davidson, p. 189) Dr. Davidson testified that he volunteered at one time to straighten out a situation where two sets of body organs had been put into one cadaver and none into another at the funeral home. (Dep. Davidson, pp. 210-211) Dr. Davidson stated that a resident was doing one of the cases when the mix up occurred and that Dr. Davidson was not responsible in any way for this mix up. (Dep. Davidson, p. 212)

D) The Wayne County Medical Examiner's Procedure

For clarity, a brief word regarding the Wayne County autopsy procedure is in order. The Wayne County Medical Examiner's Office was extremely busy. During the relevant period, upwards of thirty (30) autopsies were held daily within the basement autopsy room at the old Wayne County Morgue. Bodies would be placed on tables or gurneys. Numerous autopsies would be ongoing simultaneously. Autopsy attendants (also called "dieners") would slit open cadavers and remove the body organs for the medical examiner, assistant medical examiner or resident. The medical examiner, assistant medical examiner or resident would then examine the relevant body organ and place, upon completion, the organ in a pail or plastic bag. Following completion of the pathological examination, the autopsy assistant would then return the removed body organs (contained within a plastic bag) to the cadaver. The medical examiner, assistant medical examiner or resident would have already moved on to his next case when the autopsy assistant would suture the body closed. Lastly, the autopsy assistants would ready the body for pick-up by the particular funeral home. (Dep. Davidson, pp 90-92).

Dr. Davidson confirmed that the pathologist did not do any of the preparation for pick up and delivery by the funeral home but that the autopsy assistants, the dieners, would return the body organs into the same body after completion of the autopsy. (Dep. Davidson, pp. 90-91) Each day an assistant medical Examiner, assigned as a duty doctor for that day, would sign the autopsy reports although another pathologist may have actually performed the autopsy. (Dep. Davidson, p. 93) Following completion of the autopsy, none of the assistant medical examiners would be present when the body was packed or when a body was closed. (Dep. Davidson, p. 93)

According to Dragovic, an attendant was held responsible and terminated as a result of an incident where two sets of body organs were packed into one body. (Dep. Dragovic, p. 25) This was certainly strong evidence militating against responsibility towards Dr. Davidson. Dragovic and Witeck conceded that autopsy assistants would close up the bodies. (Dep. Dragovic, p. 61; Dep. Witeck, p. 38) The reason for this was because there were too many other duties for the medical examiners. (Dep. Dragovic, p. 61) The autopsy assistants would also release the bodies to the funeral home. (Dep. Dragovic, p. 63) Dragovic was aware of this delegation. (Dep. Dragovic, p. 63) Dr. Witeck testified that while a medical examiner was doing an autopsy, the autopsy assistants, the "dieners", would remove the organs from another body. (Dep. Witeck, p. 17) Witeck testified that only one autopsy would be undertaken at the same time. (Dep. Witeck, pp. 18-19) Because of the volume of work, it was only practical to work on more than one autopsy at a time, through the held of the autopsy assistants. (Dep. Witeck, p. 20) Witeck described the autopsy room as being cramped and confining. (Dep. Witeck, p. 63)

E) <u>The Lack of a Factual Basis for the Defamation</u>

1) As to Witeck

Having thus looked at the defamation, Dr. Davidson's unequivocal denials and the conceded autopsy procedures, we should now explore the purported factual basis for Witeck and Dragovic's statements to the Detroit Free Press. First, we will look toward statements made by the Respondent, Witeck. Witeck conceded that he made statements to the Detroit Free Press Reporter, Janet Wilson. (Dep. Witeck, pp. 12-13) Contrary to the assertions of Dr. Davidsonand also contrary to what the reporter, Janet Wilson, claimed he said, **Witeck testified that Dr. Davidson, while at an adjoining work station during autopsies, would put body parts from his autopsy into the same bucket that the Defendant Witeck was working on concerning**

another autopsy. (Dep. Witeck, p. 22) He also reported that Dr. Davidson replied "so" when this commingling was brought to Dr. Davidson's attention. (Dep. Witeck, p. 22) Witeck then testified that he would then separate the body parts. (Dep. Witeck, p. 23) Witeck testified that he had no trouble determining what body parts belonged to what body. (Dep. Witeck, p. 42) **Witeck testified that he did not know whether bodies were sent from the morgue with the wrong body parts in them or not.** (Dep. Witeck, p. 24) Witeck agreed that **what he claimed to see was a temporary commingling of body parts**. (Dep. Witeck, p. 24) Witeck was not aware of any bodies being sent from the Medical Examiner's Office with incorrect body parts. (Dep. Witeck, p. 25) Witeck testified he was not aware of any other commingling by Davidson other than the temporary commingling of body parts as referred to. (Dep. Witeck, p. 26) **Witeck had no idea whether wrong body parts were placed in corpses.** (Dep. Witeck, pp. 36, 38) **Nor was he aware of any autopsy assistant placing the wrong body parts into a corpse.** (Dep. Witeck, p. 38) **Nor did Witeck ever recall telling anyone that Dr. Davidson had done this.** (Dep. Witeck, p. 38) Of course , this is inconsistent with the testimony of Janet Wilson.

The Respondent Witeck, upon reviewing the relevant quote from the Detroit Free Press article, **agreed that a reader would get the impression that Dr. Davidson had sent bodies from the morgue with the wrong body parts in them**. (Dep. Witeck, p. 39) **Moreover, the Defendant Witeck agreed that the temporary commingling of body parts into a bucket during simultaneous autopsies (what he claimed to see) is different than if a body that had been autopsied and had left the morgue with the incorrect body parts in them.** (Dep. Witeck, p. 40) Consequently, it can be seen that there is a sharp conflict between the testimony of Dr. Witeck and Janet Wilson regarding what Witeck told her. Of course, as mentioned, Dr. Davidson denies even this temporary commingling of body parts. (Dep. Davidson, pp. 175, 176, 185, 189)

2) As to Dragovic

Now let's turn towards the factual basis allegedly supporting the communications made by Defendant Dragovic to the Detroit Free Press concerning the Wayne County Morgue. Dragovic conceded that he had a meeting with Janet Wilson of the Detroit Free Press. (Dep. Dragovic, pp. 16, 17, 23) Dragovic recalled an incident where a body was released with the wrong name on it. (Dep. Dragovic, p. 20) Dragovic indicated he did not tell Janet Wilson regarding this incident. (Dep. Dragovic, p. 22) Dragovic recalled an attendant being blamed for releasing the wrong body and that this

attendant was terminated for this incident. (Dep. Dragovic, p. 25) Dr. Davidson was not cited for any failure regarding this incident. (Dep. Dragovic, p. 25) Dragovic did not blame Davidson for this incident individually. (Dep. Dragovic, p. 34) Dragovic conceded that residents work on their own cases. (Dep. Dragovic, pp. 47-48) **Dragovic stated that Witeck told him that Davidson had mixed up body parts on multiple occasions.** (Dep. Dragovic, p. 35) Dragovic never made any special attempt to monitor Dr. Davidson. Dragovic testified that it was not his business to check out Davidson. (Dep. Dragovic, p. 57) Dragovic testified that he believed Davidson went to a funeral home on one occasion to rectify a missing body part situation. However, Dragovic had no other basis to assume that Davidson was responsible for the mix up. (Dep. Dragovic, p. 34) It was Dragovic's position that the medical examiner working on the case would be ultimately responsible for incorrect body parts leaving the Morgue. (Dep. Dragovic, p. 24) Dragovic testified that he believed Davidson had placed multiple body parts in the wrong body on one occasion simply because it was Davidson who went to a funeral home to resolve a misplaced body part situation. (Dep. Dragovic, p. 54) On the other hand, Dr. Davidson testified that he volunteered to straighten out the situation concerning the body parts. (Dep. Davidson, pp. 210-211) **Dr. Dragovic admitted that he was not personally aware of the circumstances of what happened in that case.** (Dep. Dragovic, p. 26) In other words, Dragovic was basing his allegation of Dr. Davidson putting incorrect body parts into corpses solely because Dr. Davidson went to the funeral home to rectify the situation.

3) As to Wilson and the Detroit Free Press

The entire Detroit Free Press report of December 23, 1993 concerning the Petitioner, contained within a totally pejorative article pertaining to the Wayne County Morgue, was specifically designed to reflect adversely on Dr. Laning Davidson as an assistant medical examiner. This newspaper article certainly tended to harm the reputation of the Petitioner in the estimation of the community and deter third persons from associating with the Petitioner, which, by the way, is the definition of defamation. See e.g., ***Nugen v. Slater***, 372 Mich 654, 127 NW2d 369 (1964). While the Detroit Free Press Respondents have claimed that they were in essence simply passing on the utterances of Dragovic and Witeck. The record below belies this claim.

a) **As to Mishandling of Body Parts**

The most pernicious allegation made was as to the claim that Dr. Davidson "sometimes placed multiple organs in one corpse and left them out of another."

Dr. Witeck, who allegedly made this statement, did not witness, know of any such occurrence and **specifically failed to support the Free Press statement that he was the source**. The following excerpts from the deposition of Mark Witeck demonstrate the difference between what Witeck reported and what the Free Press published:

"Q. Okay. Do you thing it was Dr. Davidson's intent to send out bodies with the incorrect body parts?

A. Did I think he intended to, no.

*Q. Okay. Do you think his, the **commingling, you are speaking about a temporary commingling of body parts then, is that correct**?*

A. Yes."

(Dep. Witeck, p. 24)

Of course, Dr. Davidson **completely denies** even this temporary commingling of body parts and expression of lack of concern that is far less defamatory than the Detroit Free Press statement. Mark Witeck admitted that **to his knowledge Dr. Davidson never returned a body with incorrect body parts**. (Dep. Witeck, p. 35) He stated that he **did not see Dr. Davidson or anyone at the request of Dr. Davidson put any wrong body parts into any incorrect body**. (Dep. Witeck, pp. 37-38) Mark Witeck **specifically refused to supply the factual support** necessary to support the Detroit Free Press defamatory statement:

*"Q. Now do you think looking at that article that refers to yourself that people reading that article could get the impression that bodies were leaving the Wayne County Medical Examiner's Office **following autopsies conducted by Dr. Davidson with wrong body parts in them***

MR. WITUS: Wait a minute. Are you referring to the entire article now or any other part of the article.

MR. BECKER: Just the part that references yourself that we have read?

*A. **Would they draw that conclusion**?*

BY MR. BECKER:

*Q. **Yes**.*

A. Yes.

Q. Do you think that is fair to Dr. Davidson?

A. It would not surprise me even remotely if that had happened because he showed no concern when it happened in front of me.

Q. Okay. But isn't it quite possible that Dr. Davidson knew exactly where he had placed the body organs?

A. Well, if he knew exactly where he placed the body organs, then he was wrong from the start because they were put into the wrong bucket.

Q. But putting body parts in the wrong bucket is different than bodies leaving the Medical Examiner's Office?

A. If you put the body part in the bucket.

Q. You have to let me finish?

A. Then put in to the body.

Q. Doctor - let me finish my question just for the record, okay? ***Is putting body parts in the wrong bucket -- that is different than bodies that had been autopsied, leaving the morgue with incorrect body parts within them, isn't that correct, do you agree with me there, don't you?***

A. ***Yes.***

(Dep. Witeck, pp. 39-40)

Moreover, it is quite apparent that the Detroit Free Press and Janet Wilson never did anything to understand the functioning of the Medical Examiner's Office. Familiarization of this process could have occurred with a simple telephone call or observation of the Morgue. It is quite clear that, pursuant to the undisputed procedure an assistant medical examiner would not place the body bag within the corpse, would not tie the corpse, would not prepare the body for the funeral home and would not deliver the body to the funeral home. Consequently, the policies and procedures, which neither Witeck nor Dragovic sought to change during their stint with the Wayne County Medical Examiner's Office, would belie any accusation that Dr. Davidson was involved in any personal wrongdoing regarding replacing body parts. Parenthetically, the procedures also lend credence to the Petitioner's assertions of actual malice against Witeck and Dragovic.

Wilson **did not recall even going to the morgue** in connection with her articles concerning this case. (Dep. Wilson, p. 25) She claimed she learned "some" of the autopsy procedures but never learned anything about the return body parts to a corpse:

"Q. Were you ever given or did you ever find out any information concerning what the procedures were at the Wayne County Medical Examiner's Office in terms of how autopsies were performed, where they were performed, what was done at an autopsy, what was done following an autopsy, what was done with regard to removing the body from the autopsy room, what was done about removing the body from the morning, did you ever obtain any information regarding that?

A. Some of it, not all of it.

(Dep. Wilson, pp. 48-49)

* * * *

Q. Did you ever learn anything about packing or returning body parts following an autopsy regarding whose responsibility that was, regarding how that was done.

MR. FINK: Again, that calls for expertise that I don't think you have established or laid a foundation this witness has and I'm not sure what you mean by responsibility.

We are talking about legal responsibility under the statute as the Medical Examiner is responsible

MR. BECKER: I'm asking you what you learned?

A. I don't recall that specifically as part of that tour, no.

(Dep. Wilson, p. 51)

Moreover, since Dr. Davidson unequivocally informed Wilson prior to publication that he did not mishandle body parts, it is quite clear that **the Free Press Defendants that Dr. Davidson was personally involved since neither Dragovic nor Witeck claimed to have supplied any information in this regard.** No independent corroboration was received although time, pertaining to these articles, was not of the essence. In this regard, a daily case ledger submitted by the Wayne County Medical Examiner's Office, which indicates the name of the physician performing the autopsy, was never offered. The Newspaper articles certainly portray Dr. Davidson as having direct personal involvement. The Defendants have failed to provide any proof directly implicating Dr. Davidson and are content not to. The Respondents have no license to personally blame Dr. Davidson for unspecified failures of the office that there is any evidence that he was responsible for.

b) <u>The Detroit Free Press Defendants are Liable for the Defamatory Headline "Dr. found a shot that was never fired; ruling overridden</u>."

The Detroit Free Press headline in false. This headline refers to the homicide of a certain Wesley Tate. Tate did in fact die due to a gunshot. Apparently metal fragments from the exploding shell struck Tate in the head, killing him. It is totally undisputed but that Wesley Tate died from a gunshot. (Dep. Davidson, pp. 63, 65, 70) His assailant, Patrice Rivera, plead guilty to manslaughter. Dr. Davidson's tentative diagnosis as recorded in the daily case ledger of June 19, 1991 was "shotgun wound to head." The information supplied to the Wayne County Medical Examiner's Office by the Detroit Police Department was that the brother of a girl who had warned the decedent to stay way from her did the shooting. Admittedly, at the time of his autopsy report, Dr. Davidson opined the bullet was from a small caliber gun. However, Dr. Davidson suggested to the Wayne County Prosecuting Attorney, Michael Reynold, that further testing be done through the FBI or Federal Bureau of Alcohol, Tobacco and Firearms. (Dep. Davidson, pp. 66, 69) In fact, this later testing was done and it was determined that the small metal fragment was, as Dr. Davidson suspected a remnant from a shotgun pellet and not that of a small caliber bullet. **Nevertheless, there never was any question but that a shot was fired and this was indeed the cause of the death of Wesley Tate**. (Dep. Davidson, pp. 63, 70) The Free Press headline clearly suggested that no bullet wound was in fact found. This is false and directly imputes the professionalism of Dr. Davidson.

G) Factual Analysis

Therefore, since the allegations of mishandling body parts are not only defamatory but heinous and criminal; and the Respondents have failed to support their allegations; the Petitioner should not be restricted by the First Amendment from presenting his case to the jury. **Simply because the Petitioner handled body parts does not mean that he returned body parts to the wrong body**. Free speech will not be stifled if this case is allowed to go forward. Actual malice should not impose such a stiff burden on the Petitioner that any approximation or insinuation however unsupported must be accepted as an honest application of the substantial truth doctrine. The fact that an autopsy assistant (deaner) outside the presence and outside the knowledge of Dr. Davidson, may have on one occasion, placed incorrect body parts in one corpse and left them out of another, does not render the defamatory statements that Dr. Davidson, personally did this true - or substantially true. Likewise, the fact that an autopsy assistant did this does not give a defamer to paint guilt with such a broad stroke. **The fact that one person in the office was guilty does not prove group guilt, if anything, it disproves it. Nor does, as the Michigan Court of Appeals held, supply proof of the lack of actual malice.**

Recall, that **even Respondent Witeck agreed that putting body parts in the wrong bucket is different than an autopsied body leaving the morgue with incorrect body parts in it**. (Dep. Witeck, p. 40) Janet Wilson testified that **her understanding of what Dragovic and Witeck told her was that Davidson performed the mix up with his own hands**. (Dep. Wilson, p. 42) It was her understanding that the medical examiner would actually return the body parts into the body following the autopsy. (Dep. Wilson, p. 53) Obviously, the Detroit Free Press article uncategorically states that Davidson himself sometimes placed incorrect body parts in corpses and left parts out of others. Wilson's testimony is, thus, strongly supportive of the Petitioner's position against Witeck and Dragovic. The inconsistencies in the testimony of the Respondents should not inure to their benefit. Recall, **there is no semblance of consistency between what the Plaintiff, Dr. Davidson testified to and what the Defendants Dragovic and Witeck reported to the Detroit Free Press**.

H) Legal Analysis

Petitioner, who has the position of assistant medical examiner, does not dispute that he must satisfy the actual malice standard. That is, that statements were made with knowledge of falsity or with reckless disregard of whether it was false or not. ***New York Times Co. v. Sullivan***, 376 US 254, 84 S Court 710,11 L Ed 2d 686(1964).

An exploration of the proofs necessary to satisfy the actual malice standard is appropriate. In ***Harte-Hanks Communications, Inc. v. Daniel Connaughton***, 491 US 657, 105 LEd2d 562, 109 SCt 2678 (1989), this Court held that despite the fact that a witness made serious allegations, a newspaper could be held liable under the actual malice standard if it failed to take other steps which cast serious doubt on the allegations. In ***Harte-Hanks, Inc.***, serious allegations against a candidate for judicial campaign were made. An individual who, admittedly, would have access to direct information concerning the substance of the allegations made these allegations. However, this Court held that this witness would not prevent liability. Indeed, the respondent corroborated some of the allegations in Harte-Hanks, Inc.

This Court clearly **required some investigation** prior to the utterances of the serious defamation. And, this was so in a case involving a political campaign, certainly where there is greater entitlement to First Amendment protection than the instant allegations, which pertain to alleged events that had happened in the distant past.

This Court in ***Harte-Hanks, Inc.*** relied on their earlier decision of ***Curtis Publishing Company v. Butts***, 388 US 130, 87 SCt 1975, 18 LEd2d 1094 (1967). In ***Curtis Publishing***, allegations of fixing a basketball game, which were once again reported by an individual, were held insufficient to defeat the actual malice standard where other means of determining the truthfulness of the serious allegations were not investigated.

Obviously, ***Harte-Hanks*** and ***Curtis Publishing*** are directly relevant to the instant case. Here, there is no testimony that Dr. Davidson would even have the responsibility to return body organs. Moreover, it is disputed between Witeck and Wilson that he told the Detroit Free Press that Dr. Davidson sometimes placed multiple organs in one corpse and left them out of another. It is undisputed that anyone ever saw him do this. Consequently, this is a very clear case of defamation. The First Amendment was not designed to permit this character assassination, which is bereft of factual support. Indeed, as to the Defendants Dragovic and Witeck, both these Defendants had and have direct knowledge as to the falsity of the allegations. As to Wilson and the Detroit Free Press, Witeck did not recall making this statement to Wilson. Moreover, the Free Press Defendants disregard of the autopsy procedures of the Wayne County Medical Examiner's Office is dispositive.

Reference should also be made to this Court's decision of ***Mason v. New Yorker Magazine, Inc.***, 501 US 496, 111 SCt 2419, 115 LEd2d 447 (1991). ***Mason*** is very relevant because **malice determined on a scale based on the difference between what was actually said and the published news report. The greater the deviation; the greater the evidence of actual malice. Here, the deviation could hardly be greater.**

Based on the fact that the Petitioner is a public official, the Michigan Court of Appeals also extended not only the actual malice standard but also the substantial truth doctrine. Even though there was a huge gap in what was proved and what was published, the Michigan Court of Appeals increased this gap under the banner of the First Amendment. (See Statement in Support of Jurisdiction)

However, generally, the substantial truth doctrine deems a statement non-defamatory if the sting or gist of the statement is true - even though there may be minor inaccuracies concerning the details. See e.g., ***Schiavone v. Time***, 847 F2d 1069, 1089 (3d Cir 1988). In the leading commentary of the law of defamation, it is explained that the more specific the defamatory charge, the more accurate it must be. *R. Smolla, The Law of Defamation*, Sec

5.08(1)(1992). In this text, the following is stated concerning substantial truth doctrine:

> *"Evidence of 'substantial truth' must be 'as broad, and as narrow, as a defamatory imputation itself.' As the defamatory charge against the Plaintiff increases in generality, the range of evidence that will establish substantial truth similarly broadens. A charge that a Plaintiff in an embezzler can be shown to be substantially true by evidence of one act of embezzlement. On the other hand, if the gist of the charge is repeated misconduct, the evidence must show a repetition. One does not show that a woman is a prostitute with proof of one act of unchastity."*

(R. Smolla, The Law of Defamation, Sec 5.10(1992) (Footnotes omitted.)

Here, there is not even one undisputed incident of mishandling of body organs.

Perhaps, the leading case concerning the substantial truth doctrine is ***Mason v. New Yorker Magazine, Inc.***, 501 US 496 111 SCt 2419, 115 LEd2d 447 (1991). In ***Mason***, this Court held that discrepancies between what was said in an interview and what was published in the magazine were sufficiently different to fall outside of the substantial truth doctrine. ***Mason***, which was principally replied upon in the lower courts by Petitioner, is most supportive of our position. The difference is in this case between what Dr. Davidson contends and what was reported as substantially true, dwarfs in comparison to ***Mason***. Mason involved differences of style and interpretation. This case involved differences as real as a job commendation versus termination and possible criminal prosecution.

In this case the Michigan Court's are contorting the substantial truth doctrine because the Petitioner is a public official under the New York Times standard. The position of the person defamed should be irrelevant to this inquiry.

Another case, which merits attention, is ***St. Surin v. Virgin Island Daily News, Inc.***, 21 F3d 1309 (3d Cir 1994). In ***St. Surin***, a report that the Plaintiff would be criminally charged was held not to be substantially true based on a report that the Plaintiff was under investigation concerning an administrative EPA administrative determination. Once again, the differences in this case are much more palpable.

The essence of the substantial truth doctrine is what effect the defamation has on the reader. In other words, whether the defamatory statement, although not literally true in every detail, is **substantially true in its implication**. See e.g., ***Wyenberg v. National Enquirer, Inc.***, 564 FSupp 924, 927 (C.D. Cal 1982); ***Gannett Company v. Re***, 496 A2d 553, 557 (Del 1985).

The Michigan Court of Appeals had previously recognized this in the case of ***Koniak v. Heritage Newspapers, Inc.***, 198 Mich App 577, 499 NW2d 346 (1993). In ***Koniak***, that Court held that there was no substantial difference whether a Defendant pled *nolo contendre* or not guilty as reported. This Court stressed that there was no substantially different effect upon the mind of the reader:

> *"In short, we cannot say that the article had a different effect upon the mind of the reader than with the literal truth. A journalist need not describe legal proceedings in technically precise language. If the article was substantially true, it would not tend to prejudice the Plaintiff anymore than a similar article using technically precise language describing the literal truth."*
>
> 499 NW2d at 349.

There is no way that ***Koniak*** can be contorted to fit the facts of this case.

Another case that dealt with the substantial truth doctrine is ***Millus v. News Day, Inc.***, 638 NYS2d 613 (1966). In ***Millus***, a political candidate was allegedly quoted as saying that he had no chance of winning and would be relieved when he did lose the election. The Plaintiff contended that he told the reporter that he had little chance of winning and that if he did win, he would incur a significant reduction of income. The New York Supreme Court held that the Defendant magazine was not protected by the substantial truth doctrine.

Similarly, and directly relevant to this case, is ***Nevada Independent Broadcasting, Inc. v. Allan***, 664 P2d 337, 37 ALR 4th 1070 (1983). In ***Allan***, it was held that slander per se existed where there was an accusation that the Plaintiff, who was a political candidate, had passed a bad check. This allegation was made in an article that questioned the ability of the Plaintiff to handle state funds if elected. A cause of action was stated

although, in reality, it was the Plaintiff's campaign agency that had bounced the check. The Nevada Court in ***Allan*** had no trouble **differentiating between what the Plaintiff did and a member of his staff did.**

Obviously, there is a factual dispute regarding whether or not Dr. Davidson was involved in the temporary mishandling of body parts. The Petitioner fervently contends that he was not involved in any mishandling of body parts-- even temporary. The Respondents have shown no direct or circumstantial evidence that he was involved in the mishandling of body parts. **None of the numerous morgue employees have corroborated this accusation. The only statement purporting to be of actual knowledge that the Plaintiff mishandled body parts has been by Mark Witeck to the fact that the Plaintiff temporarily commingled body parts in the same pail during simultaneous autopsies**. This temporary commingling is a far cry from what the relevant Detroit Free Press article stated:

> *Witeck, now chief medical examiner in Kenosha County, Wis., said Davidson mixed up parts from different bodies and sometimes placed multiple organs in one corpse and left them out of another.*
>
> *When his mistakes were called to his attention, "his response was, 'So?' recalled Witeck.*
>
> *On May 3, 1989, Assistant Medical Examiner Ljubisa Dragovic wrote a memo to Cassin saying a body autopsied by Davidson had been released for burial on April 28, 1989, without a brain. Dragovic, now the Oakland County medical examiner and a vocal critic of Cassin, said that a week later the brain was "still unlabeled, unidentified, in a plastic bag filled with formalin" on a table in the autopsy room*

Of course, as previously indicated the Petitioner has totally and unequivocally denied even this allegation. Therefore, the credibility of the statement is certainly in dispute. Why is Dr Davidson's position rendered so meaningless? Michigan's highest Court had previously ruled that where credibility is at issue in a defamation action, summary judgment is totally inappropriate. In ***Arber v. Stahlin***, 382 Mich 300, 170 NW2d 45 (1968), the Michigan Supreme Court held as follows:

> *"As we have repeatedly emphasized, summary judgment is not available whenever a presentable issue of material facts*

turns upon the credibility of an affiant or witness whose deposition has been taken."

302 Mich at 308.

The allegations made by the Respondents, Dragovic and Witeck, as to the Petitioner's mishandling of body parts clearly amount to common law defamation per se. The words used in the Free Press articles clearly have an understandable defamatory meaning. By no stretch of the imagination could it be indicated that the libel per se references to Dr. Davidson concerning mixing up body parts meant that Appellant was somehow only indirectly implicated through some vague notions of absolute liability or *respondent superior*. The words directly attributed wrongful, felonious behavior to Dr. Davidson. These statements were untrue and baseless. Likewise, the personal and professional aspersions cannot be read other than as defamatory. Under Michigan and general defamation standards, unambiguous words must be construed in their ordinary sense. See e.g., ***Hyskov v. Polonia Pub***, 239 Mich 676, 215 NW 3 (1927); ***Simmons v. Burnham***, 102 Mich 189, 60 NW 476 (1894). The most natural and understandable meaning is the one that is conveyed. ***Ledsinger v. Burmeister***, 114 Mich App 12, 318 NW2d 558 (1982). See also, *SJI2d 118.04* ("The meaning of a statement is that meaning which, under the circumstances, a reasonable person who [hears/sees] the statement reasonably understands to be the meaning intended.")

Undoubtedly, the Respondents accused the Petitioner of a crime (a felony *MCLA Sec 750.160, MSA Sec 28.357*) and also harmed the Petitioner in his profession and employment. See e.g., ***Croton v. Gillis***, 104 Mich App 104, 304 NW2d 820 (1981). Therefore, the Respondents, Dragovic, Witeck, and the Detroit Free Press should not have been summarily dismissed based on extensions of this Court's actual malice and substantial truth doctrines under the guise of the First Amendment.

The Detroit Free Press articles were extremely harmful to the reputation of the Plaintiff. The allegations - if not true - cannot be viewed in a non-defamatory manner. The defamatory allegations injured the Plaintiff/Appellant's reputation professionally and personally. The inescapable inference was made that Dr. Laning Davidson was cavalierly misplacing body parts into different body cavities determined that a gun shot caused a death - when it did not, had numerous previous professional difficulties and morbidly secreted autopsy photographs. Consequently, it can be seen that the defamation is most serious. Given the seriousness of the

defamation, the Defendants' proofs are paltry by comparison. The Defendants, Dragovic and Witeck, had no personal knowledge and no witness reports that Dr. Davidson ever placed body parts in an incorrect body. Both Witeck and Dragovic have conceded that Dr. Davidson would not even be the person who would return body parts into a cadaver. This, of course, was the responsibility of the autopsy attendants. The Defendant reporter, Janet Wilson, testified that she was not even aware of the autopsy procedure and that she had the misconception that the medical examiners actually returned body parts to the cadaver. Janet Wilson admitted that she never fully understand the procedures. (See transcript references above)

What is clear is that before such serious allegations amounting to criminal conduct are published, some investigation should be made. An understanding of the autopsy procedure and interviews with the Chief Medical Examiner and other staff should be had to corroborate or disprove these allegations. This is not what was done in this case.

RELIEF REQUESTED

WHEREFORE, Petitioner respectfully requests that this Court grant certiorari to review the judgment of the Michigan Court of Appeals, and hold that Petitioner is entitled to a trial on the merits.

Respectfully submitted,

FRANK G. BECKER & ASSOCIATES

By:_____

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(248) 569-4910

Dated: August 12, 1999

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

****

Order
Entered: May 25, 1999

Michigan Supreme Court
Lansing, Michigan

Elizabeth A Weaver,
Chief Justice
James H. Brickley
Michael F Cavanagh
Marilyn Kelly
Clifford W. Taylor
Maura D. Corrigan
Robert P. Young, Jr.,
Justices

112926

LANING DAVIDSON,

Plaintiff-Appellant,

V

SC: 112926
COA: 197170
Wayne CC: 94-436590-NO

DETROIT FREE PRESS, INC., a Michigan Corporation; JANETWILSON; LJUBISA DRAGOVIC, MARK WITECK,

Defendant-Appellees.

On order of the Court, the application for leave to appeal from the August 4, 1998 decision of the Court of Appeals is considered, and it is DENIED because we are not persuaded that the questions presented should be reviewed by this Court.

1, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 25, 1999 CORBIN R. DAVIS

STATE OF MICHIGAN

COURT OF APPEALS

LANING DAVIDSON,

Plaintiff-Appellant,

v

DETROIT FREE PRESS, INC., JANET WILSON, LJUBISA DRAGOVIC and MARK WITECK,

Defendants-Appellees.

UNPUBLISHED
August 4, 1998

No. 197170
Wayne Circuit Court

Before: Markman, P.J., and Hoekstra and Saad, J.J.

PER CURIAM.

In this defamation case, plaintiff appeals as of right and we affirm the trial court's order granting defendants summary disposition pursuant to MCR 2.116(C)(8) and (10).

To demonstrate liability for defamation, a plaintiff must prove the following elements: (a) a false and defamatory statement concerning plaintiff, (b) an unprivileged publication to a third party; (c) fault amounting to at least negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication (defamation per quod). *Postill v Booth Newspapers, Inc,* Il 8 Mich App 608, 618; 325 NW2d 511 (1982). Once a plaintiff has met his burden as to these common-law elements, a defendant introduces evidence on his defenses of truth or privilege. *Id.*

Here, regarding the requisite fault, plaintiff admits in his brief that he "must satisfy the actual malice standard." Actual malice means that the defamer published the statement with knowledge that it was false or with reckless disregard of whether it was false or not. Id. at 623. Actual malice

must be shown by clear and convincing evidence, and the question of whether the evidence is sufficient to support a finding of actual malice is a question of law. *Garvelink v The Detroit News,* 206 Mich App 604, 608; 522 NW2d 883 (1994).

Here, the trial court properly dismissed all the defamation claims against all the defendants:

Dragovic and Witeck. Plaintiff failed to present any evidence that the statements attributed to Dragovic and Witeck were made with actual malice. To the contrary, both Dragovic and Witeck produced evidence to establish that their statements regarding plaintiff's improper handling of body parts and improper release of bodies for burial were documented contemporaneously with the alleged events. Importantly, plaintiff admitted in his deposition that he did not know whether Dragovic and Witeck believed the truth of these statements. We are not persuaded by plaintiffs argument that Dragovic and Witeck knew that plaintiff was not personally responsible for preparing the bodies for release. Plaintiff has admitted that he had supervisory responsibility over these cases. Under these facts, plaintiff cannot establish actual malice as to these two defendants.

Janet Wilson and the *Detroit Free Press.* Plaintiff cannot establish actual malice against these defendants. Wilson made reasonable inquiries into the veracity of the article's statements about plaintiff. Further, the statements pertaining to the allegedly defamatory headline and plaintiff's possession of a camera at autopsies were shown to be substantially true and, therefore, cannot be the basis of a defamation claim. *Fisher v Detroit Free Press, Inc,* 158 Mich App 409, 414, 404 NW2d 765 (1987). The other statements in the article are privileged under the fair reporting statute as "fair and true" reports of public record information. MCL 600.2911(3); MSA 27A.2911(3); *Northland Wheels Roller Skating Center, Inc v Detroit Free Press, Inc.*, 213 Mich App 317, 325; 539 NW2d 774 (1995).

We decline to assess sanctions because, though plaintiff's case is weak, we are not convinced that this appeal is vexatious under MCR 7.216(C)(1)(a).

Affirmed.

/s/ Stephen J. Markman
/s/ Joel P. Hoekstra
/s/ Henry William Saad

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

LANING DAVIDSON,

Plaintiff,

Case No. 94-436590 NO

Vs.

Hon. Roland L. Olzark

DETROIT FREE PRESS, INC.,
A Michigan corporation; **JANET WILSON;**
LJUBISA DRAGOVIC and MARK WITECK,

Defendants.

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OPINION

This matter is before the Court on two motions; (1) a motion for summary disposition and sanctions brought by defendants, Detroit Free Press, Inc. (Free Press) and Janet Wilson, pursuant to MCR 2.116(C)(8) and (10) and MCR 2.114 (D), (E) and (F); and (2) a motion for summary disposition filed by defendants, Ljubisa Dragovic and Mark Witeck, under MCR 2.116 (C)(10).[1] For reasons hereinafter stated, these motions are **GRANTED.**

The underlying action arises from two news stories appearing in the December 22,1993 edition of the Free Press about problems in

the office of the Wayne County Medical Examiner. The stories were written by Wilson, a staff writer employed by the Free Press. They contained the following statements concerning plaintiff, Dr. Laning Davidson, an Assistant Wayne County Medical Examiner:

1. He (Davidson) keeps a personal camera at autopsy dissections.
2. He (Davidson) was terminated in 1977 as a resident in nuclear medicine at the Naval Hospital in Bethesda, Maryland.
3. In 1994, he (Davidson) applied for a medical license in Florida... Davidson requested that license by automatic endorsement, rather than through examination, saying he was already licensed in other states.
4. Davidson was required to undergo a mental examination in Topeka in 1986 to keep his Kansas medical license.

5a. Witeck, now chief medical examiner in Kinesia County, Wis.,
said Davidson mixed up parts from different bodies and sometimes placed multiple organs in one corpse and left them out of another,

5b. On May 3, 1989, Assistant Medical Examiner Ljubisa Dragovic wrote a memo ... saying a body autopsied by Davidson had been released for burial on April 28, 1989, without a brain. Dragovic, now the Oakland County Medical Examiner ... said that a week later the brain was "still unlabeled, unidentified, in a plastic bag filled with formalin" on a table in the autopsy room.

'See Bivens v Grand Rapids, 190 Mich App 455 457 (1991) and Michigan Mutual Insurance Co v Dowell, 204 Mich App 81. 85-86 (1994) for the applicable standards of review.

6. Doctor (Davidson) found shot that was never fired; ruling overridden.

7. The Medical Licensing Board of Indiana placed him (Davidson) on probation, but later restored Davidson's full license.

On December 21, 1994, Davidson filed a defamation action against the Free Press and Wilson, as well as Dragovic and Witeck, his former colleagues who were quoted in Wilson's stories. The instant motions ultimately followed.

In their motions, defendants seek dismissal of Davidson's cause of action, the elements of which are (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by publication. Sawabini v Desenberg, 143 Mich App 373, 379 (1985); Postill v Booth Newspapers Inc, 118 Mich App 608, 618 (1982).

The Court first considers the request of Defendants, Free Press and Wilson for summary disposition as to statements 2, 3, 4 and 7, claiming statutory fair reporting privilege pursuant to MCL 600.2911(3), which protects the press from defamation actions for fair and true reports of public proceedings, It is submitted that statements 2, 3, 4 and 7 represent accurate reports of the contents of public records contained in the licensing files of various states.

The privilege invoked by defendants provides in pertinent part:

Damages shall not be awarded in a libel action *** for the publication or broadcast of a fair and true report of matters of public record, a public and official proceeding, or of a governmental notice, announcement, written or recorded report or record generally available to the public, or act or action of a public body, or for a heading of the report which is a fair and true headnote of the report. This privilege shall not apply to a libel which is contained in a matter added by a person concerned in the publication or contained in the report of anything said or done at the time and place of the public and official proceeding or governmental notice, announcement, written or recorded report or record generally available to the public or act or action of a public body which was not a part of the public and official proceeding or governmental notice, announcement, written or recorded report or record generally available to the public, or act or action of a public body.

In determining whether statements 2, 3, 4 and 7 are fair and true reports of public and official records and proceedings within the confines of the privilege afforded by §2911 (3), the Court is guided by the test articulated in Koniak v Heritage Newspapers, Inc, 190 Mich App 516, 523 (1991):

> The information obtained and published must substantially represent the matter contained in the court records. This Court has held that such a standard is met, and a defendant is not liable, where the "gist" or the "sting" of the of the article is substantially true, that is, where the inaccuracy does not alter the complexion of the charge and would have no different on the reader than that which the literal truth would produce, absent proof that such variance caused the plaintiff damage. (Citations omitted). Accord Koniak v Heritage Newspapers, Inc. (On Remand) 198 Mich App 577, 579-580 (1993).

Under this test, minor differences are considered immaterial where literal truth would have produced the same effect on the reader, Id., p 580; Northland Wheels Roller Skating Center, Inc v Detroit Free Press, Inc, 213 Mich App 317, 325 (1995).

A review of the record in the instant case reveals that statements **2, 3, 4 and 7 are** based on records generally available to the public. Plaintiff claims that the records were not obtained by defendants from any state medical boards pursuant to the Freedom of Information Act, but were obtained from other sources. Notwithstanding, he does not dispute that the records are part of the public licensing files maintained by the states of Florida, Indiana and Kansas. The fair reporting privilege expressly encompasses public records. Thus, whether or not the records were derived from state medical boards pursuant to the Freedom of Information Act or their contents inaccurate is irrelevant. It is sufficient that the records upon which statements 2, 3, 4 and 7 are predicated are in fact public records.

With respect to statement 2, a copy of a microfilm from the National Naval Medical Center, Bethesda, Maryland submitted by defendants indicates that Davidson's residency training in nuclear

medicine was in fact terminated. (Free Press and Wilson Exhibit B). In conjunction with statement 3, defendants have appended a copy of Plaintiffs application for a Florida Medical license by endorsement which states that the plaintiff was licensed in other states. (Free Press and Wilson Exhibit D). As to Statement 4, defendants have presented a copy of an order for a mental examination for Plaintiff on the issue of whether he could safely practice medicine in Kansas. (Free Press and Wilson Exhibit F). Finally, regarding statement 7, defendants have attached a copy of an order of the Medical Licensing Board of Indiana placing Plaintiffs medical license on probation, plus a copy of an order restoring his medical license. (Free Press and Wilson Exhibits L and M). Given the foregoing evidence, the Court is of the opinion that statements 2, 3. 4 and 7 are substantially accurate, represent fair and true reports of matters included in public records and thus, are privileged under § 2911(3). The Free Press and Wilson's motion for summary disposition is accordingly granted as to statements 2, 3, 4 and 7.

All defendants attack statements 1, 5a, 5b and 6 claiming they are substantially true and/or they believed them to be true.

Truth is an absolute defense to a defamation action. Cochrane v Wittbold, 359 Mich 402, 409 (1960); Harrison Arrow Metal Products Corporation. 20 Mich App 590, 615 (1969). There is no liability where the essence of the purported defamatory matter is substantially true. Fisher v Detroit Free Press, 158 Mich App 409, 414 (1987). Furthermore, a Public Official2 may not recover damages for a defamatory falsehood relating to his Official conduct unless he proves that this statement was made with actual malice. This qualified privilege which requires proof of actual malice before a public figure may recover damages for defamation is available to a non-media defendant as well as a media defendant. For actual malice it Must be shown by clear and convincing proof that the statement was made with knowledge that it was false or with reckless disregard of whether it was false or not (Vandentoorn v Bonner, 129 Mich App 198; Garvelink v The Detroit News, 206 Mich App 604.) Whether the evidence in a defamation case is sufficient to support a finding of actual malice is a question of law. Further, there can be no recovery if the alleged defamatory statement is substantially true. (Rouch v Enquirer & News, 440 Mich 238)

In the case at bar, defendants support statement 1 with plaintiffs own deposition testimony to the effect that lie kept a camera at the Medical Examiner's Office which he used at autopsies to take photographs. The camera was owned by a professional corporation of which he was the sole shareholder. (Davidson Deposition, pp 14, 16-18). While Plaintiff claims lie used the camera because the staff photographer was not always available and to facilitate his work as a medical examiner, teacher and published author, by his own admission this statement is true.

[2]Defendants have asserted and plaintiff has not disputed he is a Public Official.

Defendants buttress statement 5a by refer ring to the deposition testimony of Witeck and Dragovic, who both indicated that the statements attributed to them by Wilson were accurate (Witeck Deposition, pp 12-13; Dragovic Deposition, p 54). It was Witeck's further testimony that during autopsies, plaintiff threw organs and pieces of tissue from one corpse into the bucket of organs and tissue from another body being dissected. (Witeck Deposition, pp 17-18). Witeck also testified that when he brought the matter up with plaintiff, he said "so." (Witeck Deposition, p 22).

In response, plaintiff insists that there is insufficient factual support for statement 5a and attempts to explain away the testimony of Witeck upon which defendants rely. In particular, plaintiff refers to Witeck's assertions that he only co-mingled body parts on a temporary basis and did not intend to send out bodies with incorrect body parts, (Witeck Deposition, p 24). Plaintiffs state of mind is irrelevant as is the nature of the mix ups, i.e., temporary or permanent. Of significance, however, is Witeck's definitive testimony that Plaintiff mixed up body parts.

Additionally, Plaintiff brings to the Court's attention the testimony of Witeck that Witeck did not recall telling Wilson that Davidson would place organs in one corpse and leave them out of another. (Witeck Deposition, p 58). Again, this testimony is immaterial, Simply because Witeck did not remember making the statement does not show that the statement was not made, especially in view of Witeck's assertion that statement 5a was accurate. (Witeck Deposition, pp 12-13).

Finally, Plaintiff's claim that Witeck testified he did not observe him put any wrong body parts into any incorrect body and leave them out of another body is unsubstantiated. By plaintiff's own admission, there was a mix up of parts from different bodies and multiple organs were placed in one corpse and left out of another. (Davidson Deposition, pp 89-93). Moreover, plaintiff. conceded that he was present for the two autopsies which gave rise to the body part mix-ups and mishandling. (Davidson Deposition, p 93). He also admitted that the responsibility for at least one autopsy was borne by him. (Davidson Deposition, pp 95-96). Based on plaintiffs testimony, then, in conjunction with the deposition testimony of Witeck referenced by defendants, the Court is of the opinion that statement 5a is substantially true.

Regarding statement 5b, defendants refer to Dragovic's testimony confirming its accuracy. (Dragovic Deposition, p 95). They also point to plaintiffs own deposition testimony pursuant to which Davidson specifically acknowledged that he was ultimately responsible for "foul-ups" on his cases, the brain incident pertained to his case and the incident involved an autopsy performed by a resident under his direction. (Davidson Deposition, pp 95-99). The remainder of statement 5b is admitted by plaintiff. (Davidson Deposition, pp 96-99). While arguably, the statements could have indicated plaintiffs claim that the actual "foul-ups" were due to the action of a resident and not him personally, the Court is satisfied that statement 5b is substantially true and that there is no clear and convincing proof of actual malice.

Statement 6 is a headline which accompanied a story concerning the criminal case of a woman who was charged with first degree murder based on plaintiffs opinion in a autopsy report that the decedent died of a single contact gunshot wound in the head. Lead fragments recovered from what he described as a small caliber bullet were subsequently sent by the Wayne County Prosecutor's Office to the Federal Bureau of Alcohol, Tobacco and Firearms for analysis. A report later issued by the Bureau indicated that the fragments were not from a fired bullet, (Free Press and Wilson Exhibit K). Plaintiff even conceded that his opinion was incorrect. (Davidson Deposition, p 64). While plaintiff seeks to excuse his findings because of misinformation from the police, the Court is satisfied that statement 6 is also substantially true.

The Court concludes that statements 5a, 5b and 6 are all substantially true and that there is no clear and convincing evidence of actual malice. Accordingly, Defendants' motions for summary disposition are GRANTED.[3] The request for costs and attorney fees made by the Free Press and Wilson under MCR 2.114(D), (E) and (F), MCR 2.625 (A) (2) and MCL 600.2691 is DENIED.

ROLAND L. OZARK

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TEOLA P. HUNTER
WAYNE COUNTY CLERK

DATED: July 29, 1996

[3]Considering this result, the Court will not pass on the parties' other arguments.

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

LANING DAVIDSON,

Plaintiff,

Case No. 94-436590 NO

vs.

Hon. Roland L. Olzark

DETROIT FREE PRESS, INC., A Michigan corporation; JANET WILSON; LJUBISA DRAGOVIC and MARK WITECK,

Defendants.

_____/

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_____/

ORDER

At a session of the Court held in the City-County Building Michigan on this day:_____

PRESENT: ROLAND L. OZARK
Circuit Judge

The Court being advised in the premises and for the reasons stated in the foregoing Opinion,

IT IS HEREBY ORDERED that defendants' motions for Summary disposition are **GRANTED** and the request of defendants Detroit Free Press, Inc. and Janet Wilson is denied.

ROLAND L. OZARK

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TEOLA P. HUNTER
WAYNE COUNTY CLERK